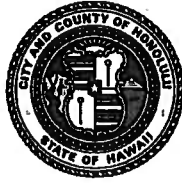


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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ADVISORY OPINION NO. 2014-6

I. SUMMARY

The Honolulu Ethics Commission ("Commission") approved a stipulation to settle the claims against former councilmember Romy Cachola in the amount of \$50,000 to be paid as a civil fine. In March and April 2014, the Commission found probable cause that Councilmember Cachola was in violation of the city's ethics laws:

1. For misusing his Council position to collect \$9,450 from 2008-2012 for expenses related to a 2008 Nissan Pathfinder from the monthly City Vehicle Allowance ("CVA") even though Councilmember Cachola was already being fully reimbursed for the same expenses from his political campaign fund. This resulted in double collection for the Pathfinder expenses.
2. As early as 2006, Councilmember Cachola had developed a pattern and practice of accepting dozens of gifts worth nearly \$5,000 from lobbyists. For the period 2008 through 2012, he accepted 44 prohibited gifts valued at about \$3,800 consisting of meals, wine, and golf from lobbyists who had matters before the Council.
3. Councilmember Cachola failed to disclose the conflicts of interests resulting from his receiving the prohibited gifts for approximately 100 bills and resolutions

related to rail transit, construction projects and rezoning that came before Council in the 2008 - 2012 period.

There are five overarching factors justifying the civil fine. First, for twelve years Councilmember Cachola sat on the Council committees that had jurisdiction over ethics laws and policy; he was the Chair for over six years. His being a Council leader for ethics laws and policies makes his violations that much more pernicious.

Second, he witnessed the consequences of misuse of position by former councilmembers Rene Mansho, Rod Tam and Nestor Garcia, but did not heed the Commission's advisory opinions in those cases.

Third, the Commission ordered him in Advisory Opinion No. 2008-5 not to use City resources for political campaign purposes. But, he collected the CVA funds ostensibly for Council business expenses even though he claimed the Pathfinder was a campaign asset.

Fourth, in Advisory Opinion No. 2003-1 the Commission specifically forewarned Councilmember Cachola not to accept gifts in excess of \$200 value from lobbyists, but he did so regularly for at least six years. The Commission also alerted him that such a Gift Cap violation would result in a conflict of interest for which disclosure before voting on measures affecting the lobbyist is required, a warning that was not heeded.

Fifth, he repeatedly violated his oath of office to uphold the City's ethics laws.

Based on the issues arising from the investigation, the Commission recommends the following:

1. The Council re-evaluate the CVA Policy to ensure that councilmembers are paid City funds based on actual mileage driven for official Council business.

2. Commission staff offer ethics training to lobbyists and others whose interests may be affected by the discharge of duties by City personnel.
3. Commission staff report to the Commission whether the current lobbying law allows the Commission to regulate the conduct of lobbyists who make unlawful gifts.

This advisory opinion is not a decision on the facts and law resulting from a contested case hearing because the matter was settled. Councilmember Cachola denies any wrongdoing in violation of the city's ethics laws, and the settlement is not an admission of any wrongdoing on his part. This opinion reflects the investigation conducted by Commission staff, some of the positions of Councilmember Cachola, and describes the specific alleged violations of law discovered as a result of the investigation and is rendered pursuant to Revised Ordinances of Honolulu (ROH), Section 3-6.7(c).

II. PROCEDURAL HISTORY

Councilmember Cachola took his Council seat representing District 7 in 2000 and termed out in October 2012. After receiving complaints, the Commission staff began investigating alleged wrongdoing regarding Councilmember Cachola's acceptance of unlawful gifts in June 2012, and misuse of the CVA in August 2013. On March 17, 2014, the Commission found probable cause of violations of the standards of conduct and designated the Executive Director and Legal Counsel as the Complainant in the case. A Notice of Alleged Violations of the Standards of Conduct was served on Councilmember Cachola on March 18, 2014. He responded on April 2, 2014. Councilmember Cachola retained Michael Jay Green, Esq. On April 28, 2014, Councilmember Cachola was served with an Amended Notice of Alleged Violations. A contested hearing was set for August 27, 2014.

After much litigation and negotiation, the parties settled on the morning of the hearing and the Commission approved the settlement that same day. The terms of the settlement are:

1. Councilmember Cachola does not admit any violation of the ethics laws.
2. This advisory opinion is based on the Commission staff's investigation and is not based on any findings of fact or conclusions of law by the Commission.
3. This advisory opinion will be made public and will identify Councilmember Cachola and describe his conduct. The Commission will transmit a copy of the advisory opinion to the counsel for Councilmember Cachola. The opinion will be embargoed from public review until 10 days after the opinion is transmitted to counsel or until Councilmember Cachola or his representative comments publicly on the opinion, whichever occurs first.
4. Councilmember Cachola waives his rights to a contested hearing and to appeal the civil fine and the advisory opinion of the Commission.
5. Within 90 days of the approval of the settlement by the Commission, Councilmember Cachola shall pay the amount of Fifty Thousand and 00/100 Dollars (\$50,000) by cashier's check to the City.
6. Upon proof of payment in full to the City, all claims in the Amended Notice of Alleged Violations dated April 28, 2014 shall be dismissed with prejudice.

III. MISUSE OF COUNCIL POSITION TO OBTAIN \$13,700 IN COUNCIL VEHICLE ALLOWANCE FUNDS.

A. Facts from the Investigation.

In March 2008, Councilmember Cachola's campaign fund, the Friends of Romy Cachola, purchased a 2008 Nissan Pathfinder. State law allows an elected official to use campaign funds to purchase and pay for the expenses of a vehicle, as long as 95% of the use of the car is for campaign purposes. Also beginning in March 2008, Councilmember Cachola was reimbursed by his political campaign fund for the Pathfinder expenses, such as gas, insurance, registration, repairs and maintenance, and parking. The total amount of expenses reimbursed by his campaign fund for the period March 2008 through October 2012 was \$17,275. During the same

four and one-half year period, Councilmember Cachola collected monthly CVA payments totaling \$13,717 from the City.

Councilmember Cachola elected to take the monthly CVA rather than report the actual mileage in his own car used for official Council business. The relevant portion of the June, 2007 Council Administrative Manual, p. III-6, para. 9 provided the CVA option:

Vehicle Allowance for Councilmembers. As of November 1, 2006, councilmembers can choose a vehicle allowance in lieu of mileage reimbursement (as described under No. 4 of this section). A Vehicle allowance will cover the expenses for the use of a councilmember's vehicle while conducting official City business. A copy of the councilmember's current no-fault card should be on file with Council Administrative Support Services. Monthly certification forms, unlike mileage reimbursement, will not be required for the vehicle allowance which will be disbursed monthly via payroll. . . . The vehicle allowance is fully taxable.

The CVA was \$250 monthly until July 2012 when it was raised to \$300.

There are no records with which to credibly allocate the Pathfinder's use among campaign purposes, official Council business purposes and personal purposes. Although Councilmember Cachola posited that he used his wife's Lexus for Council business, he was unable to produce records in support of this claim. His tax returns show that the Lexus was claimed as an expense to his wife's medical corporation in 2008, the only year for which there are records. The Lexus was owned by Dr. Cachola and was claimed as a 76% expense to her medical practice.

During his twelve years at Council, Councilmember Cachola was made aware of the misconduct committed by then Councilmembers Rene Mansho, Rod Tam, Todd Apo, and Nestor Garcia through dissemination of the Commission's formal advisory opinions for each. Moreover, the Commission found him responsible for misusing City web resources for his political campaign in 2008 and issued a formal advisory opinion to him at that time. He

participated in ethics training in 2001, 2007, 2010 and 2011. Councilmember Cachola sat on the Council committees with jurisdiction over ethics bills and policy for twelve years and was the Chair of these committees for over six years.

B. Discussion

1. Collecting the CVA was Unlawful Because the Pathfinder was Used for Political Campaign Purposes.

Revised Charter of Honolulu (RCH) Sec. 11-104¹ prohibits the use of a councilmember's position for personal benefit, including political campaign purposes. The Commission has enforced this law against councilmembers on numerous occasions. The seminal case is Advisory Opinion No. 2001-1, where the Commission held that Councilmember Rene Mansho misused her Council staff while on City work time and other City resources for her reelection activities. In addition, the Commission found that Councilmember Cachola had misused his City website by having it automatically link City web visitors to his campaign website. Advisory Opinion 2008-5.

Campaign spending laws allowed Councilmember Cachola to be reimbursed from his campaign fund for the expenses of the Pathfinder only if the expenses were related to political campaigning. Hawaii Revised Statutes (HRS) Sec. 11-381(a) allows campaign funds to be used for any purpose directly related to the candidate's own political campaign.² The campaign funds

¹RCH Sec. 11-104 provides:

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

² HRS Sec. 11-381 provides:

Campaign funds only used for certain purposes. (a) Campaign funds may be used by a candidate, treasurer, or candidate committee:

(1) For any purpose directly related:

(A) In the case of the candidate, to the candidate's own campaign; or

may not be used for personal or Council work-related expenses under HRS Sec. 11-382.³

Hawaii Administrative Rules Sec. 3-160-45(c) restricts the non-campaign use to 5%.⁴

Under the ethics law, Councilmember Cachola could not be reimbursed from the CVA for Pathfinder expenses that resulted from campaign work. Under the campaign spending law, he could not be reimbursed for the Pathfinder expenses resulting from official Council business. The fact that Councilmember Cachola purchased the vehicle with campaign funds and then submitted his quarterly campaign spending reports for reimbursement of the Pathfinder expenses demonstrated that the Pathfinder was used for campaign purposes.

2. State and City Law Require that City Funds be Used Only for Legitimate Government Purposes, Regardless of the Council Policy.

In his Response to the Notice of Alleged Violations, Councilmember Cachola argued that he had no duty under the CVA to keep records showing that he used the Pathfinder for Council business purposes. Followed to its logical conclusion, if he had no duty to maintain records of his official Council use of the Pathfinder, the taxpayers would be required to pay the CVA under circumstances where there is no proof that the CVA was being used to support a legitimate

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- (B) In the case of a candidate committee or treasurer of a candidate committee, to the campaign of the candidate, question, or issue with which they are directly associated;
- (2) To purchase or lease consumer goods, vehicles, equipment, and services that provide a mixed benefit to the candidate. The candidate, however, shall reimburse the candidate's candidate committee for the candidate's personal use of these items unless the personal use is de minimis; . . .

³ HRS Sec. 11-382 provides:

Campaign funds shall not be used:

- (1) To support the campaigns of candidates other than the candidate with which they are directly associated;
- (2) To campaign against any other candidate not directly opposing the candidate with which they are directly associated; or
- (3) For personal expenses.

⁴ HRS Sec. 3-160-45(c) provides:

(c) "De minimis", as used in this section, means that the personal use from the goods or services is five per cent or less of the total use of the property or services in a calendar month and the expenditure for the personal use of the goods or services did not exceed a fair market value of \$100 in any one calendar month.

government purpose and where the facts showed the expenses were claimed for campaign purposes.

Contrary to Councilmember Cachola's assertion, a Council policy may not lawfully allow an official to use City resources for non-City purposes. In Advisory Opinion No. 2010-2, Councilmember Rod Tam misused his Council Annual Contingency Allowance (ACA) discretionary fund to pay for meals, among other things, where the meals were not directly related to Council business. In that case, each councilmember had a discretionary fund available for miscellaneous expenses which, under the Council ACA Policy, could be used to help carry out the councilmember's City duties. Rod Tam argued that the Council ACA Policy permitted him to expense any meal as long as he discussed some issue related to the City during the course of the meal. The Commission rejected the argument.

The issue presented in this case is similar to the one the Commission addressed with regard to Rod Tam. In the Tam case, the Commission interpreted the Council ACA Policy so that it would be consistent with the prevailing law that prohibits using City resources for non-government purposes. The Commission stated that public funds may only be expended for a legitimate public purpose, citing Article VII, Section 4, Hawaii State Constitution.⁵ City government officials may only expend City funds for City purposes under RCH Sec. 11-104. Advisory Opinion No. 2010-2, pp. 4-5.

In the Tam case, the Commission also declared that, regardless of what the Council ACA Policy allowed, "there is no question that an officer with the authority to expend City funds has a

⁵ Article VII, Sec. 4 of the Hawaii State Constitution provides:

No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 4 of Article I of this constitution. No grant of public money or property shall be made except pursuant to standards provided by law.

duty to properly account for the expenses. This duty is imposed to prevent fraud against the public and to place the responsibility for public funds on the official charged with care of the funds. See, American Jurisprudence 2d, Public Officers and Employees, Sections 241 and 257.” Id. at p. 5. As a City official, Councilmember Cachola could only use taxpayer funds for legitimate City government purposes, not to collect for a vehicle that was apparently dedicated to his political campaign.

3. Councilmember Cachola Knew or Should have Known that his Conduct would Result in a Violation.

In Advisory Opinion No. 2004-7, the Commission explained that the state of mind required to prove an ethics violation is an objective one, not the subjective intent of the official or employee:

In general, a city employee or officer violates the ethics laws if he or she *knew or should have known* that his or her conduct would constitute a violation. See, Advisory Opinion No. 306 (deputy corporation counsel’s use of official corporation counsel stationery for a personal letter supporting a nominee for a state board violated RCH Sec. 11-104 notwithstanding the fact that the deputy claimed he “failed to think about the personal nature of the letter at the time [he] signed it.”). The subjective intent (or lack thereof) to violate the ethics laws goes to the seriousness or degree of the violation and is a factor to be taken into account in determining the appropriate penalty to be imposed; it is not a required element of an ethics violation. (Emphasis in original.)

See also, Advisory Opinion No. 2008-5 (Councilmember Romy Cachola knew or should have known that use of his City website for political purposes was a violation of RCH Sec. 11-104); Advisory Opinion 2008-2 (fact that supervisor tolerated employee’s misconduct did not excuse employee’s behavior); Advisory Opinion No. 2010-2 (Councilmember Rod Tam knew or should have known that use of City funds for his personal meals unrelated to City matters was a misuse of City resources); Advisory Opinion No. 2011-8 (misuse of position, computer and email by employee who had been previously warned against such misconduct).

Councilmember Cachola collected the Pathfinder expenses based on his nearly exclusive use of the Pathfinder for campaign purposes. At the same time he collected the CVA based on the legal requirement that the use of the Pathfinder was for official Council purposes.

Councilmember Cachola knew or should have known that his reasons for collecting from both sources were mutually exclusive. In addition, given his tenure on the Council ethics committees, his regular ethics training and that he either was or should have been aware of the Tam, Mansho and Cachola 2008-5 opinions, there is ample evidence that Councilmember Cachola knew or should have known that he was violating the ethics law by collecting both from his campaign fund and the CVA.

4. The Council Should Review and Correct the Council Vehicle Allowance Policy.

Both the current flat rate (Council Administrative Manual, p. III-5, para. 4(a)) and the CVA (p. III-6, para. 9) processes appear to have shortcomings. Under both options, the amount of the monthly payment is not based on actual mileage driven by a councilmember in his or her privately owned vehicle for official Council purposes. This creates a disparity where some councilmembers are reimbursed at higher rates per mile than others. Also, neither process requires that a councilmember demonstrate or certify that they have used the privately owned vehicle for official Council business. This could lead to a recurrence of the misuse of City funds similar to this case. Therefore, the Commission recommends that the Council review the “Mileage and Parking Reimbursement/Vehicle Allowance” section of the Administrative Manual and make changes that will close the loophole demonstrated by this case.

IV. ACCEPTANCE OF GIFTS IN EXCESS OF \$200 FROM LOBBYISTS.

A. Facts from the Investigation.

During each of his 12 years on the Council, Councilmember Cachola sat as a member or the Chair of each of the Council's "Ethics Committees."⁶ These committees scrutinized and recommended enactment of ethics laws and policies on behalf of the public.

The Gift Cap legislation was introduced in September 2001, when Councilmember Cachola was the "Ethics Committee" Chair. The bill passed Council with a unanimous vote and was enacted into law in April and May 2002, respectively. Despite having voted for the \$200 Gift Cap, Councilmember Cachola and other councilmembers tried to repeal the Gift Cap law in 2003.

In his official role as "Ethics Committee" Chair in 2003, while the repeal bill was pending, Councilmember Cachola sought formal advice from the Commission about how the \$200 Gift Cap law worked. In Councilmember Cachola's May 12, 2003 letter to the Commission he asked: "1. At present, will a Councilmember violate the Charter or ordinance if accepting a gift or gifts valued in excess of \$200 from a single source within a July 1 to June 30 [fiscal year] period?" The Commission's formal response to Councilmember Cachola, Advisory Opinion No. 2003-1, explained the consequences of a Gift Cap law violation to him:

To illustrate how the gift cap law works, assume a lobbyist offers a gift valued at \$500 to a councilmember. If the councilmember accepts the gift, he or she will have violated the prohibition against gifts in excess of \$200. The violation is grounds for impeachment under RCH Sec. 11-106 and ROH Sec. 3-8.5(a). . . . [I]f the lobbyist has a bill that will be voted on by the Council, the councilmember may vote on the bill as long as he or she first discloses the conflict of interest created by the acceptance of the gift. (Emphasis added.)

⁶ The Council committees charged with handling ethics issues at different times were the Policy Committee, the Executive Matters Committee and the Executive Matters and Legal Affairs Committee. Each is referred to as the "Council Ethics Committee."

In this case, Commission staff interviewed witnesses who lobbied Councilmember Cachola and the Council on issues important to their employers or clients. The interests of Lobbyist 1⁷ included the support of rail transit; land use, rezoning and development in a certain district; economic development; environmental issues and others. Lobbyist 2 represented clients interested in obtaining land use variances from Council and other projects. Lobbyist 3 supported economic development and construction on Oahu, including rail transit.

Each lobbyist stated that the meals, wine and other gifts provided to Councilmember Cachola were used to build and maintain a relationship with him. Having this relationship facilitated the lobbyist being able to meet in person with Councilmember Cachola and explain the client's position about legislation that was or would be before Council. Each of the lobbyists noted that Councilmember Cachola preferred to meet for dinner meals at upscale restaurants such as Ruth's Chris, Hiroshi Tapas, Duc's Bistro, Michele's, Roy's and various country clubs. The meals were accompanied by wine, usually selected by Councilmember Cachola. The cost of the events were deducted as business expenses by the lobbyist because at each dinner meeting or golf outing the lobbyist's Council issues were part of the conversation with Councilmember Cachola.

This practice as described by the lobbyists is consistent with Councilmember Cachola's characterization as to why the dinner and golf meetings occurred:

[I]t was their intention to seek audience and exchange information with me regarding City issues. I often used these opportunities to share my concerns or disagreements

⁷ Pursuant to Opn. Ltr. Nos. 99-7, 98-5 and 96-2, State of Hawaii Office of Information Practices, the Commission declines to reveal the identity of the lobbyists in this case. Our concern is that disclosing the names of these witnesses will undermine the likelihood of lobbyists or other witnesses cooperating with the Commission's investigations in the future. This would result in a frustration of a legitimate government function under HRS Sec. 92F-13(3).

with many issues that they were pursuing at the time. Letter from Romy Cachola to Charles W. Totto in response to Notice of Alleged Violations, p. 4. (Emphasis added.)

The lobbyists' expense records demonstrated Councilmember Cachola's pattern and practice of receiving gifts from the lobbyists during the period Fiscal Year⁸ 2006-2007 and Fiscal Year 2007-2008. Staff only focused on gifts that exceeded \$200, singly or in the aggregate, from one source in each fiscal year. In the two fiscal years Councilmember Cachola received over sixty gifts valued at a total of more than \$5,000. Thus, as early as 2006, the earliest year for which Commission staff sought information, Councilmember Cachola regularly solicited, accepted or received gifts of meals and golf outings from City-registered lobbyists or companies employing City-registered lobbyists.

For the Fiscal Years 2008-2009, 2009-2010, 2010-2011, 2011-2012 and the portion of 2012-2013 before Councilmember Cachola left the Council, he accepted an additional 44 gifts above the \$200 threshold, worth \$3,800. (Commission staff determined not to go forward with allegations that Councilmember Cachola accepted additional gifts that were below the \$200 threshold value.)

Besides Advisory Opinion No. 2003-1, Councilmember Cachola received ethics training for Councilmembers from Commission staff in 2001, 2007, 2010 and 2011. Also, he was sent an informal advisory opinion from staff on November 6, 2007 once again reminding the councilmembers and staff about the Gift Cap law and recommending that all councilmembers keep a gift log by which they could track the value of gifts and avoid going over the \$200 Gift Cap.

B. Discussion

⁸ City fiscal years run from July 1 through June 30.

1. The Gift Cap Law Prohibits Gifts to a Councilmember that are Equal to or in Excess of \$200 Where the Donor has Matters Before Council.

A “gift” is defined as the voluntary transfer of property to another without compensation. Advisory Opinion No. 2003-3. ROH Sec. 3-8.8(a) gives a broad description of what may be a gift in the context of public officials.⁹ See also, Hawaii State Ethics Commission Advisory Opinion No. 2011-1 (Jul. 20, 2011) (including food, drink, and invitation to events as “gifts” under HRS Sec. 84-11 the state’s gift laws); U.S. Office of Government Ethics Op. Ltr. No. 85x9 (Jul. 12, 1985) (“...dinners and receptions are gifts for purposes of the standards of conduct.”) The value of a gift is generally its fair market value. Advisory Opinion No. 2003-3.

The Gift Cap law prohibits a councilmember from soliciting, accepting or receiving gifts equal to or in excess of \$200 in one fiscal year from a donor whose interest the councilmember

⁹ ROH Sec. 3-8.8 provides:

- (a) No councilmember shall solicit, accept or receive, directly or indirectly, any gift, whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can be reasonably inferred that the gift is intended to influence the councilmember in the performance of the councilmember's official duties or is intended as a reward for any official action on the councilmember's part.
- (b) During each one-year period beginning on July 1st and ending on June 30th, no councilmember shall solicit, accept, or receive, directly or indirectly, from any one source any gift or gifts, not exempted by subsection (c), valued singly or in the aggregate in excess of \$200.00.
- (c) Exempted from the prohibition of subsection (b) are the following:
 - (1) Gifts received by will or intestate succession;
 - (2) Gifts received by way of distribution of any inter vivos or testamentary trust established by a spouse or ancestor;
 - (3) Gifts from a spouse, fiancé, fiancée, any relative within four degrees of consanguinity of the councilmember or the spouse, fiancé, or fiancée of such a relative. A gift from any such person shall not be exempt from subsection (b) if the person is acting as an agent or intermediary for any person not covered by this subdivision;
 - (4) Political campaign contributions that comply with state law;
 - (5) Anything available or distributed to the public generally without regard to the official status of the recipient;
 - (6) Gifts that, within 30 days after receipt, are returned to the giver or donated to a public body or to a bona fide educational or charitable organization without the donation being claimed by the councilmember as a charitable contribution for tax purposes. In the event the gift is donated to a public body or bona fide educational or charitable organization, the councilmember shall send, along with the gift, documentation acknowledging the initial giver of the gift; and
 - (7) Exchanges of approximately equal value on holidays, birthdays, or special occasions.
- (d) A violation of this section by a councilmember shall be punishable in accordance with Section 3-8.5.

may affect in carrying out his or her City duties. Exceeding the \$200 Gift Cap is a strict liability violation. In other words, the usual requirement to prove a violation -- that the wrongdoer knew or should have known that the conduct would result in a violation -- does not need to be proven. In addition, there is no requirement to show that a reasonable person could conclude that the gift was offered to influence or reward the recipient in the discharge of his or her official duties. A gift exceeding the \$200 threshold is "conclusively presumed" to be intended to influence or reward the recipient. Advisory Opinion No. 2002-3.

A gift or gifts solicited, accepted or received by a councilmember from a lobbyist with matters before the Council that exceeds \$200 in a single fiscal year are unlawful. ROH Sec. 3-8.8(b); Advisory Opinion No. 2003-1.

2. A City Officer or Employee must take Reasonable Steps to Determine the Value and Source of a Gift.

Councilmember Cachola suggested he did not violate the Gift Cap law because he did not know who paid for some of the gifts or their fair market value. We believe that the gift prohibitions obligate a City officer or employee to take reasonable action to determine the value and source of a gift. If we adopted Councilmember Cachola's approach, City personnel might turn a blind eye to the gift transaction while still accepting the benefit of the gift. This would undermine the purpose of the gift restrictions, which is to limit the circumstances where it may reasonably appear to the public that a City official may offer preferential treatment to the gift donor. Advisory Opinion No. 2013-3 at 8. For those who receive several gifts, reasonable steps include keeping a gift log which records the date, donor and approximate value of the gift. It is also reasonable to expect that the recipient will ask the donor for the fair market value of the gift, especially where the gift is being written off as a business expense. See, Advisory Opinion No. 2003-3.

3. The Commission Staff Should Offer Ethics Training to Lobbyists and to Report whether the Lobbying Law Authorizes the Commission to Sanction Lobbyists who make Unlawful Gifts to City Officials.

The obligation to follow the ethics laws belongs to each City officer and employee.

However, the Commission notes that Councilmember Cachola's gift practices were facilitated by the lobbyists who made the gifts. To that end, we direct staff to offer to train City lobbyists, vendors and contractors in how to prevent or reduce the risk of ethical breaches by City personnel. In addition, we ask that staff review whether the current lobbying law allows the Commission to regulate the conduct of lobbyists who make unlawful gifts.

V. COUNCILMEMBER CACHOLA FAILED TO DISCLOSE CONFLICTS OF INTERESTS ON 100 BILLS AND RESOLUTIONS.

Councilmembers alone of all City officials are permitted to vote on matters where they have a conflict of interest,¹⁰ but only if the conflict has been fully disclosed in writing as soon as the councilmember is aware of the conflict and before he or she votes on the conflicted measure. RCH Sec. 11-103¹¹; Advisory Opinion No. 2012-4 (Councilmember Nestor Garcia's failure to disclose conflicts of interest related to his employment by Kapolei Chamber of Commerce when the Chamber was supporting rail transit measure before Council); Advisory Opinion Nos. 2011-1 and 2007-1 (Councilmember Todd Apo's failure to disclose conflict of interest).

¹⁰ RCH Sec. 3-107.1 states in pertinent part: "All councilmembers shall have the right to vote in council at all times."

¹¹ RCH Sec. 11-103 provides:

Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent.

Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he or she has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

As the Commission explained to Councilmember Cachola in Advisory Opinion No. 2003-1, acceptance of a gift over \$200 is not only a violation of the Gift Cap law, but it also creates a conflict of interest for the councilmember on any matter in which the donor has an interest at Council. The test is whether a reasonable person, knowing the facts, could conclude that the interests of the donor or donor's client would be affected by the bill or resolution before the Council. Councilmember Cachola did not file a disclosure of conflict of interest for any of the 100 bills or resolutions that related to the affected interests of the lobbyist/gift donors.

VI. THE GRAVITY OF THE AGGRAVATING FACTORS JUSTIFY THE \$50,000 CIVIL FINE.

The Commission reviews the mitigating and aggravating factors in assessing the amount of the civil fine that is appropriate for ethical misconduct. ROH Sec. 3-8.5(d).¹² The criteria most germane to this case include:

¹² ROH Sec. 3-8.5(d) provides:

(d) In addition to any other penalty, sanction or remedy provided by law, the ethics commission may impose a civil fine against a former or current officer or exempt employee of the city who has been found by the ethics commission to have violated the standards of conduct in Article XI of the revised charter or this article. For the purposes of this section, "officer" has the same meaning as in Section 13-101.4 of the revised charter and shall include officers of the board of water supply and the Honolulu Authority for Rapid Transportation and "exempt employee" means all employees of the executive and legislative branches of the City and County of Honolulu and all full-time employees of the board of water supply and the Honolulu Authority for Rapid Transportation who are exempt from civil service pursuant to revised charter Sections 6-1103(a)-(d), (i) and (k) and 6-1104(a)-(d), but shall not mean exempt employees in clerical positions or employees within a bargaining unit as described in Section 89-6, Hawaii Revised Statutes.

(1) Where a civil fine has not otherwise been established in this article, the amount of the civil fine imposed by the ethics commission for each violation shall not exceed the greater of \$5,000 or three times the amount of the financial benefit sought or resulting from each violation.

(2) In determining whether to impose a civil fine and the amount of the civil fine, the ethics commission shall consider the totality of the circumstances, including, but not limited to:

- (A) The nature and seriousness of the violation;
- (B) The duration of the violation;
- (C) The effort taken by the officer or exempt employee to correct the violation;
- (D) The presence or absence of any intention to conceal, deceive or mislead;
- (E) Whether the violation was negligent or intentional;
- (F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney;
- (G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited;

- The misconduct occurred over several years on a monthly basis;
- Councilmember Cachola had prior knowledge of ethics laws resulting from: his twelve years on the Council “Ethics Committees,” the Commission’s formal advisory opinions to him and opinions describing serious abuses by other councilmembers, and his recurring Council ethics training;
- He failed to cooperate in the investigation and contested proceeding, for example, by ignoring Commission subpoenas and discovery orders and filing several meritless motions before the Commission as well as in circuit court;
- He blatantly disregarded the ethics laws and the Commission’s advisory opinions; and
- His misconduct will undermine the Council’s integrity.

Indeed, each of these exacerbating factors are present for each of the major claims against Councilmember Cachola. Below we focus on some of the most serious factors regarding the different claims.

A. Misuse of Councilmember Position to Obtain \$9,450 for Vehicle Expenses.

Although the alleged violations started in 2008, the relevant time period for which the Commission may impose a civil fine is August 2009 through October 2012.¹³ The total CVA payments obtained by Councilmember Cachola during this time was \$9,450.

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- (H) The amount, if any, of the financial or other loss to the city as a result of the violation;
 - (I) The value of anything received or sought in the violation;
 - (J) The costs incurred in enforcement, including reasonable investigative costs and attorneys’ fees;
 - (K) Whether the officer or exempt employee was truthful and cooperative in the investigation; and
 - (L) Any other relevant circumstance.

¹³ ROH Sec. 3-8.5(d)(6)(B) provides:

Notwithstanding Section 3-6.3(c), no civil fine may be imposed under this subsection:
 (B) For an investigation commenced by the commission on its own initiative, if the investigation is commenced more than four years after the alleged violation occurred.

1. Councilmember Cachola had Prior Notice that he could not Use City Funds for Campaign Purposes.

While on the Council, Councilmember Cachola was or should have been aware of his obligation to avoid misusing his City position for several reasons besides his tenure on the Ethics Committees. In Advisory Opinion No. 2008-5, the Commission found that Councilmember Cachola himself had misused his City website for his political campaign.

In addition, two important advisory opinions regarding councilmember misuse of City resources were rendered by the Commission, each directly relevant to Councilmember Cachola's understanding of the consequences of ethics violations. Rene Mansho (in Advisory Opinion No. 2001-1) misused City staff work time and other City resources to support her political campaigns in violation of RCH Sec. 11-104. Rod Tam (in Advisory Opinion No. 2010-2) abused the Council's Annual Contingency Allowance for personal meals unrelated to council business. Councilmember Cachola voted to censure Rod Tam for his misconduct.

The Hawaii State Constitution and RCH Sec. 11-104 prohibit the use of City resources for other than City government purposes. In sharp contrast to this bedrock principle of governance, Councilmember Cachola benefitted from a double collection scheme where he was repaid for car expenses from his campaign fund for campaign purposes and from the CVA for Council-related activities. He took advantage of the honor system within the CVA and collected reimbursements without justifying them.

2. Financial Benefit to Councilmember Cachola and Harm to the City.

The financial loss is relatively small compared to the loss of public trust suffered by the City in this case. The public, the Council and City officers and employees reasonably expected that he would use his position to advance the integrity of City government rather than flout the law and the Commission's advisory opinions in order to benefit himself. The recurring and

self-enriching nature of his transgressions will erode the public trust and confidence that the City Council makes its decisions based on the merits and without preferential treatment.

B. Receiving \$3,820 in Gifts Over the \$200 Gift Cap Threshold.

As early as 2006, Councilmember Cachola had developed a pattern and practice of annually accepting dozens of meals and golf worth thousands of dollars from the lobbyists. However, the relevant time period to assess a civil fine¹⁴ is for Fiscal Years 2008 through October 2012. This period included 44 violations of the Gift Cap law valued at more than \$3,800 total.

1. Councilmember Cachola Sought Ethics Advice from the Commission and Repeatedly Failed to Follow it.

Councilmember Cachola discussed and voted to pass the Gift Cap legislation in 2002. In 2003, he asked the Commission for and received a formal advisory opinion as Chair of the Ethics Committee. Advisory Opinion No. 2003-1 specifically illustrated and explained for Councilmember Cachola that receiving a gift or gifts in excess of \$200 from one source in one fiscal year where the source has interests before the Council was a violation of the Gift Cap law.

But his conduct was wholly contrary to the Gift Cap law and Advisory Opinion No. 2003-1. He accepted thousands of dollars in gifted meals and golf outings from lobbyists with matters before the Council from July 2008 through October 2012. In two fiscal years, the Gift Cap was exceeded by \$1,200 from one source. The vast majority of gifts were meals with wine at expensive restaurants that Councilmember Cachola requested or was known to prefer.

2. Financial Benefit to Councilmember Cachola and Loss to the City.

¹⁴ See FN 13.

Councilmember Cachola benefited by at least \$3,820 in free meals, wine and golf from lobbyists and businesses with matters before the Council. As with collecting funds for the Pathfinder from the taxpayers, the harm to the integrity of City government cannot be overstated. The Council's senior member for ethics law and policy repeatedly defied a fundamental safeguard to avoid unlawful gifts and maintain the public's confidence in the Council decision making process.

C. Councilmember Cachola Failed to Disclose his Conflicts of Interest for 100 Bills and Resolutions.

A vote by a councilmember is null and void if the member had a conflict of interest that was not been properly disclosed under RCH Sec. 11-103. Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. Ap. 304, 666 P.2d 177 (1983). The failure to disclose will invalidate the Council action if, after discounting the void vote, there are no longer sufficient votes for the measure to pass.

Commission staff has reviewed the 100 measures and removal of Councilmember Cachola's votes have not changed the outcome for those measures. However, if the votes had been 5 to 4 on some measures, his misconduct could easily have resulted in the nullification of City laws.

D. Civil Fine Approval.

ROH Sec. 3-8.5(d)(1)¹⁵ allows the Commission broad discretion in setting the appropriate civil fine after reviewing the listed factors. Having analyzed the aggravating and mitigating factors, the Commission finds the amount of \$50,000 reasonable under the circumstances. This

¹⁵ ROH Sec. 3-8.5(d)(1) provides:

Where a civil fine has not otherwise been established in this article, the amount of the civil fine imposed by the ethics commission for each violation shall not exceed the greater of \$5,000 or three times the amount of the financial benefit sought or resulting from each violation.

amount should repay the City for funds lost from the CVA, disgorge his gains from gifts, and deter similar misconduct while taking into account his position as a councilmember and how egregious and inexcusable the violations were.

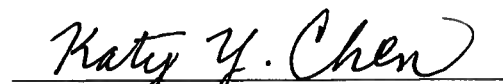
VI. CONCLUSIONS AND RECOMMENDATIONS

- A. The Commission finds that the civil fine of \$50,000 is reasonable under the circumstances;
- B. The Commission recommends that the Council review the Vehicle Allowance policy in light of this opinion and inform the Commission what, if any, corrective action it takes; and
- C. The Commission directs its staff to offer training to City lobbyists, vendors and contractors regarding the City gift laws and other ethics provisions to reduce the likelihood that these entities will provide opportunities for misconduct by City personnel. In addition, we direct staff to report whether the current lobbyist law sufficiently authorizes the Commission to take corrective action where a lobbyist is responsible for an unlawful gift.

APPROVED AS TO FORM
AND LEGALITY:



CHARLES W. TOTTO
Executive Director and Legal Counsel



KATY CHEN, Vice Chair
Honolulu Ethics Commission

DATED: Honolulu, Hawaii, September 18, 2014